IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 615

DANNY ESCOBEDO,

Petitioner,

vs.

ILLINOIS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

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CITATIONS

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Opinion Below

The opinion of the Supreme Court of Illinois (R. 125-134) is reported at 28 Ill. 2d 41; 190 N.E. 2d 825.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on May 27, 1963 (R. 125). The petition for writ of certiorari was filed July 1, 1963, and was granted on November 12, 1963 (R. 134-135). The jurisdiction of this Court rests on 28 U.S.C. 1257(3) since the right of the petitioner to due process of law under Amendment XIV to the Constitution of the United States was denied him below.

Questions Presented

1. Whether the totality of circumstances surrounding the obtaining of a pretrial court-reporter statement from the petitioner by the interrogating police rendered its subsequent admission into evidence against him at trial a denial of the due process of law guaranteed him by the Constitution of the United States, Amendment XIV.

2. Whether due process of law was denied petitioner by the admission against him at trial of a pre-trial court reporter statement which was obtained from petitioner in police custody only after his request to consult with his personal counsel, who was present at the police station demanding to consult with petitioner, was arbitrarily denied by the interrogating police.[1]

Constitutional Provision Involved

The applicable Constitutional provision involved is Amendment XIV, Section 1, which reads, in material part, as follows:

> " • • • nor shall any state deprive any person of life, liberty, or property, without due process of law; • • • "

Statement of the Case

Manuel Valtierra, petitioner's brother-in-law, was fatally shot before midnight on January 19, 1960. At 2:30 A.M. on January 20, 1960, petitioner and co-defendant Robert

[1] Respondent has formulated this second issue thusly:

> "II. Whether the denial of counsel during police interrogation, without regard to any other circumstances, bars the use of a confession obtained after such denial—should this Court reconsider its holdings in *Crooker* v. *California*, 357 U.S. 433 and *Cicenia* v. *LaGay*, 357 U.S. 504?" (p. 2, Brief for Respondent In Opposition)

Chan were arrested without a warrant and were confined and interrogated by the police until 5:00 P.M. that day (R. 16, 17, 83, 84) when they were released pursuant to a Writ of Habeas Corpus obtained by Mr. Warren Wolfson their attorney (R. 8, 79). Petitioner made no statements during this fifteen hour detention (R. 16).

Between 8:00 P.M. and 9:00 P.M. on January 30, 1960 petitioner and his sister Grace, widow of the deceased, were once again taken into custody by the Chicago Police and were removed to police headquarters (R. 17). They were not charged with any crime (R. 59, 80). Upon arrival at the police station, between 9:30 and 10:00 P.M. (R. 56, 80, 100) petitioner asked to see his lawyer (R. 17, 18, 85). His request was denied (R. 17). Moreover, at no time did petitioner have the opportunity to speak with anybody other than the agents of the State and his confrontation with a co-defendant prior to the time that his statement was ultimately obtained.

Warren Wolfson, petitioner's attorney, arrived at the police station at 9:30 P.M. (R. 56, 80). He demanded of the police that he be allowed to consult with his clients, petitioner and Bobby Chan, who had also been rearrested (R. 5, 80). He even pointed out the Illinois Statute giving him the right of private consultation (R. 5, 6). The police, however, told him he could not see petitioner because they had not completed questioning (R. 5, 61, 80). The denial by lower ranking officers was reinforced by the officer in charge, Acting Chief of Detectives, Lieutenant Flynn, who personally refused to allow Mr. Wolfson to visit his client (R. 6, 62, 80). This occurred prior to the time that Lieutenant Flynn ever spoke to petitioner (R. 57). Access to the petitioner was continually denied Mr. Wolfson and he ultimately left the station about 1:00 A.M. without ever having been permitted to interview or advise petitioner (R. 80). Although,

at one time when he was being refused access to petitioner, Mr. Wolfson did succeed in observing him across a room for a second or two. At that time, he made a waving motion to the petitioner and the petitioner waved back to him. No other contact was made between petitioner and his attorney (R. 80).

While petitioner's attorney was thus being treated, the interrogation by the police proceeded. Petitioner was a young man, age 22 years (R. 9, 79) of Mexican extraction (R. 10). There is no evidence of any past history of law violations or subjection to official interrogation. At no time during the entire night was he ever advised by any of his interrogators of his constitutional rights of counsel and freedom from self-incrimination (R. 19, 32). He was agitated and nervous as he had not slept well in over a week (R. 50). As to his appearance, the police lieutenant testified: "He was nervous, he had circles under his eyes and he was upset" (R. 55).

Petitioner had been arrested by Officers Gerald Sullivan, John Loftus and Frank Lassandrella (R. 29). These police officers, who attempted to convince him to make a statement while they were taking him to station (R. 30), took him to the station where he was turned over to the other police officers (R. 30), among them Officers Thomas Talty (R. 36, 37), Thomas O'Malley (R. 15, 37), Fred Montejano (R. 36) and Officer McNulty (R. 14). Deputy Chief of Detectives, Lieutenant Patrick J. Flynn, was in charge of the investigation (R. 14). These officers at various intervals during the evening, all interrogated petitioner (R. 85, 88).

According to the testimony of petitioner, Officer Fred Montejano spoke to him in Spanish (R. 19). Petitioner further testified that Montejano promised him that he would not be prosecuted if he made a statement, and further promised that he and his sister could go home and would be used

only as witnesses against one Benedict DiGerlando, the alleged assassin (R. 17). Montejano, petitioner also testified, spoke to him allegedly as a friend of his brother's and, stated: "Benny is Italian and there is no use in a Mexican going down for an Italian" (R. 19). This statement referred to the fact that DiGerlando had allegedly told the police that petitioner had done the shooting. All of these specific assertions were met with specific denials on the part of Officer Montejano (R. 9, 11, 12, 39).

Petitioner, at one point, saw that his attorney was at the police station (R. 18, 21, 86). However, he further saw that he and his attorney were being denied their right of consultation (R. 21, 86). Petitioner was confronted with a Benedict DiGerlando, also in custody, who accused petitioner of being the slayer (R. 26). Petitioner vehemently denied this accusation and told the police that DiGerlando was lying (R. 26).

After all of the foregoing transpired, petitioner dictated a court reporter statement to an assistant state's attorney who was called to the police station shortly before midnight (R. 31). However, he subsequently refused to sign the transcript of this statement stating that the police had not kept their promise and that the statement was not true (R. 88). Although he had been arrested on Saturday night, he was not arraigned until Monday morning (R. 102).

Co-defendant Chan also executed a pre-trial statement. Both petitioner and Chan made appropriate motions to suppress their statements prior to trial (R. 2).[2] The trial court sustained Chan's motion but denied petitioner's (R. 40, 41). The distinction that was relied upon by the trial

[2] Under Illinois law, the admissibility of a confession is solely for the judge (*Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745). A motion to suppress brought prior to trial is an appropriate means of presenting this issue.

judge was that Chan gave his statement unaware that his attorney was in the building, but petitioner, having observed his attorney attempting, albeit unsuccessfully, to gain access to him, was not in the same situation (R. 41). At trial, petitioner's objection to the admission of his statement into evidence was likewise overruled (R. 74). He thereafter testified that the matters in the statement were not true (R. 88) and denied any complicity in the crime (R. 82, 83, 88).

The trial court allowed the statement into evidence, instructing the jury that it was competent evidence and that they had no right to disregard the statement as evidence (Bill of Exceptions, p. 632). The Supreme Court of Illinois determined that they could "find no reason for disturbing the trial court's finding that the confession was voluntary" (R. 128). The Illinois Supreme Court also rejected the petitioner's contention "that the confession is inadmissible because it was obtained after he had requested the assistance of counsel, which request was denied" (R. 128). Although recognizing that a "minority of the Supreme Court" (R. 128) would agree with petitioner's contention, the Court concluded that "[h]aving given due weight to the various considerations involved, we are of the opinion that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to a reasonable opportunity to interrogate outside the presence of counsel" (R. 134).

Summary of Argument

A. The admission into evidence of petitioner's pre-trial statement was a denial of his right to due process guaranteed by the United States Constitution, Amendment XIV, because the totality of circumstances surrounding the obtaining of the statement by the interrogating police

deprived petitioner of his Constitutional rights. The circumstances consisted of a confluence of the following factors, each of which, either singly or in combination with others, have resulted in previous holdings that due process had been denied.

1. The following factors are uncontroverted in the record:

(a) The denial of the right of the petitioner to consult with his counsel who was present at the police station demanding to consult with him;[3]

(b) The failure to advise petitioner of his Constitutional rights, included the right of counsel and the right against self incrimination;[4]

(c) The incommunicado detention of petitioner, who was seen only by agents of the State;[5]

(d) The confrontation with a fellow suspect who accused petitioner of being the assassin;[6]

(e) The questioning by relays of police officers as well as an assistant State's Attorney;[7]

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[3] *Crooker* v. *California*, 357 U.S. 433, 78 S.Ct. 1287 (1958); *Cicenia* v. *LaGay*, 357 U.S. 504, 78 S.Ct. 1297 (1958); *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959); *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961).

[4] *Gallegos* v. *Colorado*, 370 U.S. 49, 82 S.Ct. 1209 (1962); *Griffith* v. *Rhay*, 282 F.2d 711 (C.C.A. 9, 1960), cert. den., 364 U.S. 941 (1961); *Payne* v. *Arkansas*, 356 U.S. 569, 78 S.Ct. 844 (1958); *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347 (1949).

[5] *Spano* v. *New York*, fn. 3 supra; *Culombe* v. *Connecticut*, fn. 3 supra; *Haynes* v. *Washington*, 373 U.S. 503, 83 S.Ct. 1336 (1963); *Payne* v. *Arkansas*, fn. 4 supra; *Watts* v. *Indiana*, fn. 4 supra; *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541 (1961).

[6] *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183 (1897).

[7] *Spano* v. *New York*, fn. 3, supra; *Watts* v. *Indiana*, fn. 4 supra.

(f) The illegal arrest of petitioner in contravention of two distinct state statutes;[8]

(g) The youthfulness, inexperience, minority group extraction, and upset emotional state of the petitioner;[9]

2. The following clearly coercive[10] factors are testified to by petitioner although they are controverted by the testimony of a police officer:

(a) A promise of immunity from prosecution in return for the statement;

(b) The deception practiced by the police who told petitioner they only wanted a statement for use against another prisoner;

(c) The threat to confine petitioner's sister unless petitioner gave a statement coupled with the promised release of the sister if petitioner cooperated.

When viewed in light of the totality of all these circumstances it is clear that the resulting statement was obtained in contravention of petitioner's Constitutional rights and its admission into evidence resulted in the denial of due process to the petitioner.

B. Wholly apart from the many other factors present, the unlawful denial of the request of petitioner to consult with his counsel, who was present at the police station demanding access to petitioner, rendered his subsequent statement inadmissible in evidence against him at trial. The

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[8] *People* v. *Frugoli*, 334 Ill. 324, 166 N.E. 129 (1929); cf.: *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

[9] *Gallegos* v. *Colorado*, fn. 4 supra; *Spano* v. *New York*, fn. 3 supra; *Haley* v. *Ohio*, 332 U.S. 596, 68 S.Ct. 302; *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281; *Culombe* v. *Connecticut*, fn. 3 supra.

[10] *Culombe* v. *Connecticut*, fn. 3 supra; *Lynum* v. *Illinois*, 372 U.S. 528, 83 S.Ct. 917 (1963).

right to counsel, if it is to have any efficacy at all, must obtain when the need for the advice of counsel is crucial. Nowhere is the necessity for the advice of counsel more crucial than where the police, either pursuant to correct legal procedures or in contravention of such, have a suspect under their absolute control in a situation where the result of such an interrogation can render any subsequent assistance of counsel wholly illusory. If the police, through the device of postponing a suspect's opportunity to consult with his attorney, can obtain a statement from the suspect with no external protections except their own self-restraint, then the suspect's rights to be free from testimonial self-incrimination and to be rendered the assistance of counsel are valueless. Especially is this so in the case at bar where the advice of counsel would have precluded the eliciting of the statement of petitioner upon which his conviction was solely based. As the New York Court of Appeals has recently stated:

> "* * * we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together. And, it necessarily follows, if such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also * * * contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." (*People* v. *Donovan*, 1963, 13 N.Y. 2d 148, 193 N.E. 2d 628 at 630.)

ARGUMENT

I.

The Totality of Attendant Circumstances Surrounding the Obtaining of Petitioner's Pretrial Statement Disclosed That the Statement Was Not Made Freely, Voluntarily, and Without Compulsion or Inducement of Any Sort But, Rather, Was the Product of the Combination of Many Improper Pressures Which Caused Petitioner's Will to Be Overborne Rendering the Subsequent Statement Inadmissible Against Him.

The factual complex of this case raises the issue of the permissible limits to which law enforcement officers may go before they transgress the inalienable rights to due process guaranteed to all accused by the Fourteenth Amendment of the United States Constitution. It is well recognized that a statement of an accused obtained while in police custody will be inadmissible in evidence if the statement has not been elicited freely, voluntarily, and without compulsion or inducement of any sort. (*Haynes* v. *Washington*, 373 U.S. 503, 83 S.Ct. 1336 at 1343, and cases cited therein (1963).) The substance of this test of "voluntariness" has come to be measured by an examination of all the attendant circumstances (*Haynes* v. *Washington*, supra, 83 S.Ct. at 1343, especially footnote 10 therein) and if "constitutionally impermissible methods" [11] have been used to assist in ob-

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[11] The source of this phrase is in Mr. Justice Frankfurter's opinion, speaking for the Court in *Rogers* v. *Richmond*, 365 U.S. 534, 541, 81 S.Ct. 735, 740 (1961):

> "Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their

taining it, these factors weigh heavily on the question of the admissibility of the statement into evidence.

In the case at bar, when petitioner was arrested by the police and taken to police headquarters, he entered the interrogation process intent on making no statement.[12] Yet at the end of the interrogation process, and in contravention of the prior instruction of counsel (R. 20) a statement was obtained. It is inescapable that the statement that resulted was the product of the interplay of various improper pressures, and its admission into evidence resulted in a denial of petitioner's right to due process of law.

An analysis of the circumstances attendant upon the obtaining of this court reporter statement reveals a multitude of improper factors that have, in prior cases, induced this Court to hold other statements inadmissible. These will be discussed seriatim.

Uncontroverted Facts

A. Petitioner Was Denied His Right to Consult With His Attorney Who, in Fact, Was Present at the Police Station Demanding to Consult With Him.

In *Crooker* v. *California*, 357 U.S. 433, 78 S.Ct. 1287 (1958), and *Cicenia* v. *LaGay*, 357 U.S. 504, 78 S.Ct. 1297 (1958), this Court recognized that an accused's lack of coun-

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inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees."

[12] Indeed he had refused to make any statement during a prior period of police interrogation which lasted for fifteen hours and which was terminated only after his attorney had secured his release on a Writ of Habeas Corpus (R. 16).

sel must be considered as "one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness" (357 U.S. at 509, 78 S.Ct. at 1300). This element has been recognized in many cases decided by this Court as a major, if not controlling,[13] factor in determining whether the standards of due process have been met. (See, e.g. *Gallegos* v. *Colorado*, 370 U.S. 49, 82 S.Ct. 1209 (1962) and *Haynes* v. *Washington*, 373 U.S. 503, 835 S.Ct. 1336 (1963).)[14]

In the instant case, the evil of the denial of the right of petitioner and his counsel to consult with each other is compounded by the fact that the police refused this right despite a positive state statute granting it.

Section 229 of the Division I of the Criminal Code (Ill. Rev. Stats. 1959, chap. 38, par. 477) provides:

> "All public officers, sheriffs, coroners, jailers, constables or other officers or persons having the custody of any person committed, imprisoned or restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law of this state, whom such person so restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody; * * *"

Moreover, an ancillary statute (Ill. Rev. Stats., 1959, chap. 38, par. 449.1) provides:

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[13] See *Crooker* v. *California*, 357 U.S. 433 at 441, et seq., dissenting opinion of Mr. Justice Douglas.

[14] See also *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961); *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959); *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541 (1961); *Rogers* v. *Richmond*, 365 U.S. 534, 81 S.Ct. 735 (1961); *Payne* v. *Arkansas*, 356 U.S. 560, 78 S.Ct. 844 (1958).

"* * * whoever shall, while holding another person in custody, deny the other person his right to consult and be advised by an attorney at law whether or not such person is charged with a crime, * * * shall be fined not less than $100 nor more than $1,000 or shall be imprisoned for not less than ten days nor more than six months, or both." [15]

Attorney Warren Wolfson had been retained by petitioner prior to his arrest (R. 79). Indeed, on the occasion of petitioner's prior 15 hour detention of January 20, 1960, Mr. Wolfson had succeeded in securing petitioner's release on a writ of habeas corpus (R. 79). As to what transpired on the night in question, Mr. Wolfson's testimony at trial reveals:

"* * * January 30th, 1960, I was still Danny Escobedo's lawyer. On that day I received a phone call and pursuant to that phone call I went to the Detective Bureau at 11th and State. The first person I talked to was the sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission to speak to my client Danny Escobedo. I had been informed earlier by phone that he was in the Detective Bureau. Sergeant Pidgeon made a call to the Bureau lockup and informed me that the boy had been taken from the lockup to the Homicide Bureau. This was between 9:30 and 10:00 in the evening. Before I went anywhere, he called the Homicide Bureau and told them there was an attorney waiting to see Escobedo. He told me I could not see him. Then I went upstairs

[15] This and similar statutes have been cited by this court as examples of a "procedural safeguard against coercive police practices" (*Crooker* v. *California*, 357 U.S. 433, dissent of Douglas, J., at 488, footnote 4) cf.: *Culombe* v. *Connecticut*, 367 U.S. 568, footnote 29. However, it is manifest that the police, in many instances, pay no attention to these legislative commands.

to the Homicide Bureau. There were several Homicide Detectives around and I talked to them. I identified myself as Escobedo's attorney and asked permission to see him. They said I could not. At this time there had been no formal booking and Danny Escobedo had not been charged with a crime.[16] The police officer told me to see Chief Flynn who was on duty. I identified myself to Chief Flynn and asked permission to see my client. He said I could not. As to what time that was, I think it was approximately 11:00 o'clock. He said I couldn't see him because they hadn't completed questioning. As to whether I got an opportunity to see Danny Escobedo that night, for a second or two I spotted him in an office in the Homicide Bureau. The door was open and I could see through the office. As to whether I attempted to talk to him or say something to him, I waved to him and he waved back and then the door was closed, by one of the officers at Homicide. There were four or five officers milling around the Homicide Detail that night. As to whether I talked to Captain Flynn any later that day, I waited around for another hour to two and went back again and renewed my request to see my client. He again told me I could not. He did not tell me that he made an investigation and determined that I was not Danny Escobedo's lawyer. He never told me that. * * * I had conversation with every police officer I could find. I was told at Homicide that I couldn't see him and I would have to get a writ of habeas corpus. I left the Homicide Bureau and from the Detective Bureau at 11th and State at approximately 1:00 A.M. I had no opportunity to talk

[16] The practice of holding a suspect, without charge, for "investigation" has recently been characterized as "questionable" by this Court, speaking through Mr. Justice Goldberg in *Haynes* v. *Washington*, 83 S.Ct. 1336 at 1339, footnote 3, in which case the Spokane, Washington, police practiced the "small book" procedure.

to my client that night. I quoted to Captain Flynn the Section of the Criminal Code which allows an attorney the right to see his client. This is the Code where rights are given to a client in custody to talk to his lawyer" (R. 79-81).

Police Lieutenant Flynn's testimony is corroborative. He stated that about 9:30 P.M., before he even knew that petitioner was in the building, he was informed that there was an attorney in the building representing petitioner (R. 57). Lieutenant Flynn asked that the attorney be sent up to his office and he spoke to Mr. Wolfson at that time (R. 57). Lieutenant Flynn then advised petitioner's attorney that "if the man was in custody and if he was not in the process of being questioned or investigated then he would be allowed to see him" (R. 58). At that point petitioner was not charged with any crime. He was just "being investigated" (R. 59).

On redirect examination, Lieutenant Flynn once again summarized what had transpired. This colloquy is illuminating.

"Q. And just tell us what you said to him and what he said to you?

A. I determined that the man was in the building and he was being—he was under questioning relative to a homicide and I explained to him that the man had only been in the building a very short while and as soon as the officers had completed their questioning that he would be allowed to see him.

Q. And what, if anything, did he say to you then?

A. He started quoting some statute relative to his rights and demands as far as seeing his client.

Q. And then what did you say to him?

A. I went—that was the end of it.

Q. That was the end of the conversation?

A. Yes.

Q. Then where did you go and where did he go, if you know?

A. He walked out of the office. At this time I went over to the Homicide" (R. 61, 62).

Officer Gerald Sullivan's testimony also establishes the custom of the police to refuse to allow a suspect's attorney to consult with him. Officer Sullivan had been one of the police who had arrested petitioner (R. 29, 99). He was present at various times in the Detective Bureau. He testified that he saw Attorney Wolfson after Wolfson had been called to the office of the Chief [Flynn]. He was present when the conversation was carried on. The record recites:

"Q. Did Mr. Wolfson make a demand to see his clients, who are the defendant and another Robert Chan, at this time?

A. Yes, he did.

Q. Who did he make this demand to?

A. Deputy Chief of Detectives Patrick Flynn.

Q. Did Mr. Flynn answer this demand?

A. He said that when we were through interrogating, we were in the process of interrogating these men, that they had only been in a short time, when we finished talking to him he would be able to see his client.

Q. About what time was this?

A. That was around 10:30 P.M.

Q. And was any time limit set whereby the attorney could see his clients?

A. No, sir. We were in the process of interrogating" (R. 30, 31).

Petitioner testified that as soon as he arrived at the police station, he refused to talk until he had consulted with

his attorney (R. 17). The Illinois Supreme Court has also accepted this request for counsel by petitioner as being established in this case (R. 132). Accordingly the record uncontrovertedly demonstrates that petitioner had requested to consult with his attorney, and the attorney had demanded access to his client, and the requests of both were unlawfully refused prior to the time that petitioner made any oral admissions, let alone gave a court reporter statement.

The denial of counsel, alone, has as yet not been held by this Court to render a subsequent statement inadmissible.[17] (*Crooker* v. *California*, 357 U.S. 433, 78 S.Ct. 1287 (1958), *Cicenia* v. *LaGay*, 357 U.S. 504, 78 S.Ct. 1297 (1958).) However, in these two cases declining to so hold, the denial of counsel was the only factor present. The *Crooker* case involved the peculiar circumstance of an accused virtually able to be his own attorney, having completed college and a year of law school, including a course in criminal law. Additionally he was advised prior to his interrogation that he need not answer any questions. Thus, apart from the denial of counsel, there was no due process violation raised (357 U.S. at 438, 78 S.Ct. at 1291). Likewise, in the *Cicenia* case there was no claim of denial of due process apart from the fact of denial of counsel during interrogation.

However, in the instant case much more is presented than the bare absence of counsel. Such other factors, which distinguish the *Crooker* and *Cicenia* cases,[18] shall now be considered.

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[17] Although this Court has, in this case, granted certiorari to determine whether or not the *Crooker* and *Cicenia* cases should be reconsidered. It shall be hereinafter proposed that such fact, *co ipso*, should render the statement inadmissible. See *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963).

[18] Such as was done in *Griffith* v. *Rhay*, fn. 4 supra.

B. Petitioner Was Not Advised of His Constitutional Rights.

In *Gallegos* v. *Colorado*, 370 U.S. 48, 82 S.Ct. 1209 (1962), this Court held that the failure to inform the accused of his rights had the same effect upon that accused as if he had no rights. It was there determined that advice as to his rights "from someone concerned with securing him those rights" would have put that accused "on a less unequal footing with his interrogators" (370 U.S. at 54, 82 S.Ct. at 1212). The confession of that accused was held to be inadmissible because no one had offered such advice. See also *Griffith* v. *Rhay*, 282 F.2d 711 (C.C.A. 9, 1960) cert. den. 364 U.S. 941 (1961).[19]

In *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347 (1949), this Court, in pointing to a number of factors which vitiated the confession, included the fact that "the petitioner • • • was without friendly or professional aid and without advice as to his constitutional rights" (338 U.S. 49 at 53, 69 S.Ct.

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[19] In *Griffith* v. *Rhay*, the Court stated:

"In our opinion Griffith was so prejudiced by not having the advice of counsel on the afternoon of October 11, 1956. No one told him at that time that he did not have to submit to interrogation. There is no testimony that he had previously been given this information. Considering his youth (age 19) and background, it could not reasonably be inferred that Griffith understood that he had the right to remain silent.

"Had he been represented by an attorney on that occasion Griffith would have without doubt been advised that he need not talk. • • •

"Since Griffith had a right to the assistance of counsel on the afternoon of the interrogation, his failure to request such assistance has significance only if it amounted to a waiver of that right. • • •

"There is nothing in this record to indicate that Griffith knew that he had the right to the assistance of counsel on the afternoon in question. It follows that there is no support for a finding or conclusion that his failure to request counsel constituted a waiver of a known right" (282 F.2d at 717, 8).

1349). And in *Payne* v. *Arkansas*, 356 U.S. 560, 78 S.Ct. 844 (1958) one of the factors enumerated as bearing on the "totality" of circumstances was that Payne "(3) was not advised of his right to remain silent or his right to counsel" (356 U.S. at 569, 78 S.Ct. at 850).

In this case, it was the act of the police, in denying the attorney-client consultation, that caused the accused to be ignorant of his constitutional rights.

It has been suggested by the Illinois Supreme Court[20] that, having had access to his attorney at some time prior to his arrest, the petitioner in fact did know of his rights. However, the record demonstrates that petitioner's attorney had not explained these rights to him. Rather, all he had told petitioner was "to tell the officers in a nice way that I was sorry but that I could not talk to them until I had the advice of my lawyer" (R. 20). Thus, petitioner's attorney had not explained to petitioner the substance of all his various rights but had merely told petitioner what to do and say, but not why. And when petitioner did what his attorney had instructed and found it ineffective, he was left in a situation which was inherently coercive, for petitioner could well have believed that he was completely at the mercy of the police without hope of outside assistance.

Nevertheless, respondent has argued in its Brief in Opposition that "petitioner had the substance of the assistance of counsel during the period of police custody though the form may have been lacking" [21] because of petitioner's prior

[20] "While much is made of the circumstances that his request for counsel was not immediately (sic; Quaere—should this not be "ever"?) honored, the record shows that he had previously consulted with his attorney about the case and that he understood from a motion the lawyer made to him at the police station that he should not talk to the police" (R. 127).

[21] Brief For Respondent In Opposition, page 17.

conversations with his attorney. Assuming, *arguendo*, that this be so, it is just as effective a means of psychological coercion to arbitrarily deny a suspect a right he knows he has than not to tell him of his rights at all. A recent commentator has observed:

> "Even if the accused is informed or knows of his constitutional rights, his confession may still be attributable to other practices typically found in totalitarian countries. He may still be held incommunicado, be denied counsel, or be not given a prompt preliminary hearing. In seeing his rights callously disregarded, the accused may well despair of ever realizing the benefits of those rights or of a fair proceeding. Under the circumstances, standing alone before the awesome forces of the criminal law he may feel that the constitutional rights he knows of will not be made available to him * * * It seems clear that the benefits of constitutional rights are not effectuated merely by guaranteeing that the accused shall know of them—he must be also able to exercise them." (King, A New Constitutional Standard for Confessions, 8 Wayne L. Rev. 481 at 489.)

In the *Crooker* case,[22] the denial of counsel was held nonprejudicial because the accused knew of, and exercised, his constitutional rights. In the *Gallegos* case,[23] on the other hand, the lack of knowledge of constitutional rights rendered the confession inadmissible. In the instant case, the denial of counsel was accompanied by a failure to inform the petitioner of his rights (R. 19, 32). Such combination renders statements thereafter obtained inadmissible. (See *Griffith* v. *Rhay*, 282 F.2d 711.)

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[22] 357 U.S. 433, 73 S.Ct. 1287 (1958).

[23] 370 U.S. 49, 82 S.Ct. 1209 (1962).

C. The Incommunicado Detention of Petitioner, Who Was Seen Only by Agents of the State.

Once petitioner was arrested he was taken to the police station and was not allowed to consult with anyone until he gave a statement. By happenstance, his attorney observed him through an open door but, after one or two seconds, that door was closed by a policeman (R. 80). Officer Sullivan testified that there was no time limit set on the length of secret police interrogation. He also stated that the attorney was told that he wouldn't be admitted to his client until the police were finished (R. 30, 31).

Accordingly, the situation that existed was that the petitioner was arrested but was not "booked"; his attorney was not allowed to see him and the interrogation could continue as long as the police were not finished with the petitioner. The fact that the petitioner succumbed to the effect of the incommunicado detention, having no doubt that the police could keep him as long as they desired, does not detract from the coercive nature of the detention. Indeed, the fact that petitioner submitted within a few hours despite his inclination to the contrary merely buttresses the efficacy of this coercive practice. The vice of incommunicado detention,[24] coupled with the apparent power of the police

[24] It has recently been very persuasively argued that the McNabb-Mallory Rule (*U.S.* v. *McNabb*, 318 U.S. 322, 63 S.Ct. 698 (1943); *United States* v. *Mallory*, 354 U.S. 499, 77 S.Ct. 1356 (1957)) invalidating confessions obtained from an accused subsequent to arrest where there has been a delay in arraignment, has a Constitutional basis and, as a result of the cases of *Wong Sun* v. *United States*, fn. 8, supra, and *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), applies to the various states under the Fourteenth Amendment Due Process Clause. See Broeder, *Wong Sun* v. *United States, A Study of Faith and Hope*, 42 Nebraska Law Review, 483 at 565-594 (1963). The Supreme Court of Michigan has adopted the rule (*People* v. *Hamilton*, 359 Mich. 410, 102 N.W. 2d 738). See also *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281 (1957).

to perpetuate that condition at their desire, has been consistently condemned by this Court.[25]

D. The Confrontation With a Fellow Suspect Who Accused Petitioner of Being the Assassin.

The theory of the prosecution has never been that petitioner was the actual perpetrator of the homicide. The State's case had always been that petitioner's culpability rests on his being an accessory before the fact who asked another to do the actual slaying. Yet, while being held in custody, petitioner was told by several policemen that the State had evidence that petitioner was the slayer (R. 9, 17, 30, 38).[26] Upon vehemently denying his guilt, petitioner was confronted with one Benedict DiGerlando, another suspect. DiGerlando falsely accused petitioner of doing the shooting (R. 26).

This device,[27] one of many methods of psychological coercion, caused the petitioner to make the false statement

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[25] See for example, the following cases: *Spano* v. *New York*, fn. 3 supra; *Culombe* v. *Connecticut*, fn. 3 supra; *Haynes* v. *Washington*, fn. 5 supra; *Reck* v. *Pate*, fn. 5 supra; *Payne* v. *Arkansas*, fn. 4 supra; *Watts* v. *Indiana*, fn. 4 supra; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944).

[26] Compare *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183 (1897). In *Bram* the statement of the fellow suspect was true. In this case, the accusatory statement of DiGerlando, the suspect, was false.

[27] The coercive operation of this device has been explained as follows:

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with a crime, the result was to produce upon the mind that fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one

suggested by Officer Montejano (R. 87), to wit: to clear himself by putting the blame on DiGerlando. The petitioner, not schooled in the law, could not know that by making such a false statement, ostensibly to remove false suspicion from himself, he was nonetheless implicating himself as an accessory.

It goes without saying that if petitioner had been allowed to consult with counsel, he would have been told that so long as DiGerlando's accusations were groundless, which they were, petitioner did not have to worry about them. And petitioner would surely have been told of the folly of attempting to clear himself of supposed suspicion by going along with a false story implicating another. In short, he would have been told of his right to remain silent and he would have been advised to exercise that right.[28]

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situated as was the prisoner when the confession was made, how, in reason, can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. * * * To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then use the denial by the person so situated as a confession, because of the form in which the denial is made is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the Accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of." (*Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183 at 194-5 (1897).)

[28] "Had he been represented by an attorney on that occasion Griffith would without doubt have been advised that he need not talk. In view of his physical condition, the possible effect of the demerol, and the seriousness of the charge and penalty, such an attorney would probably also have advised him to

E. The Questioning, by Relays of Police and the State's Attorney.

As set forth in the case of *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959), one of the elements there present that rendered that confession inadmissible was that "[h]e was subjected to questioning not by a few men but by many" (360 U.S. at 322, 79 S.Ct. at 1206, 7).[29] Likewise, in the case at bar petitioner was subjected to questioning by police officers of various ranks up to the acting Chief of Detectives and thereafter by an assistant State's Attorney. He had been picked up by three police officers. He was turned over to others at the station who questioned him at various times. Finally he was interrogated by Chief Flynn, after Flynn had told his attorney that he couldn't see petitioner. Ultimately the statement which was received in evidence was obtained, not as a narrative statement, but in a question and answer form (Bill of Exceptions, pp. 328-340) with an assistant state's attorney asking the questions (compare *Spano* v. *New York*, 360 U.S. at 322, 79 S.Ct. at 1206 (1959)).

The State showed no qualms about having one of its own attorneys interview the petitioner despite having refused to allow petitioner's own counsel the same privilege. (See *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628,

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refuse to talk. [dropping to footnote] As Justice Jackson said, concurring in *Watts* v. *State of Indiana*, 338 U.S. 49, 58, 69 S.Ct. 1347, 1357, 1358, 93 L.Ed. 1801:

'Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.'" (*Griffith* v. *Rhay*, 282 F.2d 711, 717 (1960).)

[29] See also *Watts* v. *Indiana*, fn. 4 supra; *Ashcraft* v. *Tennessee*, fn. 25 supra.

629 (1963).)[30] The police showed their power to petitioner by having him exposed to a vast number of officers and, further, by allowing him to witness his own attorney's futile efforts to see him. A statement that follows such a display of might cannot be allowed into evidence as having been received "without coercion of any sort."

F. The Illegal Arrest of Petitioner.

Two distinct statutes bear on the illegality of petitioner's arrest which precipitated his pre-trial statement. The Illinois Habeas Corpus Statute (Ill. Rev. Stat., 1959, Ch. 65, § 26) provides in material part:

> "No person who has been discharged by order of the court or judge, on a habeas corpus, shall be again imprisoned, restrained or kept in custody for the same cause, * * * "

The testimony of petitioner's attorney is uncontroverted that, on January 20, 1960, he had secured petitioner's release from custody on a writ of habeas corpus (R. 8, 79). The Illinois Supreme Court so found (R. 131). Yet on the night in question, petitioner was once again picked up and placed in custody, not charged with an offense, but merely "being investigated" (R. 59). This clearly was an unlawful arrest and confinement.

At the time of petitioner's arrest, Illinois also had another statute[31] (Ill. Rev. Stats. 1959, Ch. 38, § 379) which provided, in material part:

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[30] The ethical impropriety of this procedure is forcefully discussed by Professor Broeder in his recent article, *Wong Sun* v. *United States—A Study In Faith and Hope*, 42 Nebraska Law Review, 483 at 599-604 (1963).

[31] Referred to by this Court in *Culombe* v. *Connecticut*, 367 U.S. 568 at 586 (footnote 28), 81 S.Ct. 1860, 1870 (1961).

> "If two or more persons . . . shall imprison another . . . for the purpose of obtaining a confession . . . they shall be imprisoned in a penitentiary not less than for one year."

This statute, making the acts of the police a felony, was also manifestly violated to petitioner's detriment. It is clear that the sole purpose of petitioner's arrest was to confine him "for investigation". He was not charged with a crime but was being interrogated as to his supposed complicity in his brother-in-law's death. The State cannot deny that petitioner was imprisoned for the purpose of obtaining a confession, for that indeed is what happened.

The Illinois Supreme Court, back in 1929, had stated:

> "*It is not the right of policemen* anywhere in this State *to arrest men supposed to be guilty of* or charged with *crime and confine them* in a police station or other such place *and deprive them of the lawful right* of bail and the right *of counsel* * * * *by hiding them* * * * *for the unlawful* and criminal *purpose* of extorting a confession or *of obtaining a confession by any means* in such stations or places." (*People* v. *Frugoli*, 334 Ill. 324. 333, 166 N.E. 129, emphasis added.)

Unfortunately, the Illinois Supreme Court has failed to recognize this salutary holding in the present case. Nevertheless, for their violation of these two statutes, and for their confinement without charge for "investigation", the police arrest of petitioner was clearly illegal. The statement of petitioner, being the fruit of his unlawful arrest cannot be admitted into evidence.[32] *Wong Sun* v. *United States*,

[32] "Verbal evidence which derives so immediately from * * * an unauthorized arrest * * * is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion" (83 S.Ct. at 416).

370 U.S. 471, 83 S.Ct. 407 (1963). Although that was a case arising in the Federal courts, the language of this Court's decision compels the conclusion that a like standard applies to state prosecutions under the Fourteenth Amendment.[33] In the instant case, the statement of the petitioner is surely the "fruit" of petitioner's unlawful arrest and, under the *Wong Sun* decision, is inadmissible against petitioner.

Moreover, the illegal nature of petitioner's detention distinguishes the *Crooker* and *Cicenia* cases and, in combination with the denial of counsel and other factors here present, is an additional circumstance resulting in a denial of petitioner's right to due process.

G. The Youthfulness, Inexperience, Minority Group Extraction, and Upset Emotional State of the Petitioner.

In *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961), Mr. Justice Frankfurter articulated the fact that voluntariness, to a great extent, depends upon the makeup of the person against whom the police pressures are brought to bear.

In *Crooker* v. *California*,[34] the denial of counsel was held nonprejudicial because of the background of the accused. In contrast, in *Gallegos* v. *Colorado*,[35] the mere failure to advise that accused of his rights,[36] absent any other elements of coercion, rendered his statement inadmissible be-

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[33] See Professor Broeder's excellent analysis of the application of Wong Sun rule to the States: Broeder, *Wong Sun* v. *United States. A Study in Faith and Hope*, 42 Nebraska Law Review, 483 at 557-564 (1963). Cf. *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

[34] 357 U.S. 433, 78 S.Ct. 1287 (1958).

[35] 370 U.S. 49, 82 S.Ct. 1209 (1962).

[36] See also *Griffith* v. *Rhay*, 282 F.2d 711 (1960).

cause of his age and experience.[37] Petitioner here was only 22 years of age (R. 19). He was of Mexican extraction (R. 10). There is no evidence of any past history of law violations or subjection to official interrogation. Compare *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959). The denial of the assistance of counsel certainly had the desired effect of eliciting a pre-trial statement in this case whereas in *Crooker* and *Cicenia* there was no contention of any causal relationship between those deprivations and the subsequent confessions.

Controverted Facts

In addition to the foregoing factors, all of which are uncontroverted in the record, petitioner testified to various other matters which bear on the voluntariness of his statement. It has been observed that one of the inherent vices of incommunicado detention is that the suspect's version of the events that transpired therein cannot be corroborated and will be met by the contrary testimony of the police. Mr. Justice Black's dissenting remarks of *In re Groban*, 352 U.S. 330, 340-343, 77 S.Ct. 510, 517, 518 (1957), have been many times repeated:

> "The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his as-

[37] See also *Haley* v. *Ohio*, 332 U.S. 596, 68 S.Ct. 302 (1948); *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281 (1957).

sistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.

The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter he is subject to their uncontrolled will. * * * Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

In the case at bar petitioner stated, under oath, that he had been offered a promise of immunity in return for a statement; that he had been told by police that they only wanted his statement for use against another, and that the police used the device of promising to release his sister if he cooperated (R. 19). Of course, the police officer, Montejano, denied making these statements (R. 9, 11, 12, 39).[38]

In the Brief for Respondent in Opposition to the granting of the Writ of Certiorari, the respondent argued that this

[38] "Relevant here also is the overwhelming evidence that police officers who are guilty of unconstitutional or other improper behavior often if not usually commit perjury when asked about it on the stand, or, indeed, anywhere else. * * * (C)itation of authorities * * * can be found in Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn. Law Review 1083, particularly at 1177 et seq. (1959)." Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483 at 522 (1963).

Court is bound by the factual determination of the Illinois Supreme Court which found that the testimony of Officer Montejano, as accepted by the trial court, should not be disturbed.[39] However, this Court is not so bound.

In *Haynes* v. *Washington*, 373 U.S. 503, 83 S.Ct. 1336 (1963), this Court ruled:

> "Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue.
>
> "It is well settled that the duty of constitutional adjudication resting upon this court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* determination here, see, e.g., *Ashcraft* v. *Tennessee*, 322 U.S. 143, 147-148, 64 S.Ct. 921, 923, 88 L.Ed. 1192; 'we cannot escape the responsibility of making our own examination of the record' " (83 S.Ct. at 1344).

In its original opinion,[40] the Illinois Supreme Court stated,

> "In spite of the fact that the officers denied making any promises of leniency, it seems manifest to us, from the undisputed evidence and the circumstances surrounding the defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement and would be granted immunity from prosecution" (R. 110).

Unfortunately, upon rehearing the Court retracted this conclusion and found otherwise, but the fact that six of the

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[39] Brief For Respondent In Opposition at pp. 2, 3 "Preliminary Statement".

[40] R. 107-110. This opinion was superseded by the opinion of May 27, 1963 (R. 125-134) promulgated upon rehearing.

seven justices of the Illinois Supreme Court originally drew this conclusion indicates that there is warrant in the record for accepting petitioner's version of the impermissible techniques used by Officer Montejano to elicit his statement.

> "Detective Montejano made promises to me. He told me that DiGerlando had already made a statement saying that he shot the man, my brother-in-law, and he would see to it that we [petitioner and his sister, Grace, the widow of the deceased] would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando. He said we would only be held as witnesses against DiGerlando, and that we would be able to go home that night" (R. 17).

Montejano denies the promises. Yet the surrounding circumstances strongly support petitioner's testimony. There would have been no reason for petitioner to give the statement, against his first determination to remain silent, unless he felt that he would be benefitted. The promise of being allowed to go home, and of being granted immunity from further police machinations would likely have swayed any person of petitioner's background and situation, guilty or innocent. Not being allowed to consult with his attorney, petitioner would have no way of knowing that the promise of Montejano was illusory. The petitioner was only aware of the apparent absolute power of the police. He had seen that they had the power to exclude his counsel. Surely he could have felt that the police also had the power to grant him immunity.

Moreover, as in *Culombe* v. *Connecticut*,[41] where the police involved the family of the accused, here petitioner's sister, Grace, the widow of the deceased, had also been arrested. Petitioner testified:

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[41] 367 U.S. 568, 81 S.Ct. 1860 (1961).

"I saw that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement. The fact that I had been made promises by Montejano had a bearing upon my making this statement. The fact that the police officers made promises specifically that I would not be prosecuted if I made this statement had an effect upon my making the statement. The promises were in fact the motivation that made me make this statement" (R. 19).

If the testimony of petitioner is determined by this Court to reflect the true facts, then the pre-trial statement must, of course, be rejected as involuntary. Compare *Lynum* v. *Illinois*, 372 U.S. 528, 83 S.Ct. 917 (1963). However, even if Officer Montejano's denials are accepted as more reliable, the combined effect of the uncontroverted facts, to wit: the refusal of the police to allow petitioner to consult with his counsel; the incommunicado detention of petitioner; the failure to inform petitioner of his constitutional rights; the confrontation of petitioner with a false accuser; the questioning by relays of police and a State's attorney; and petitioner's unlawful arrest of which his statement was the fruit; especially when considered in light of petitioner's age, inexperience, minority group status and upset emotional state[42] resulted in manifold denials of petitioner's right to due process which rendered his subsequent statement inadmissible against him.

[42] Petitioner was agitated and nervous; as he had not slept well in a week. He appeared, to Chief Flynn, to be "nervous, he had circles under his eyes and he was upset" (R. 55).

II.

Due Process of Law Was Denied Petitioner by the Admission Against Him at Trial of a Court Reporter Statement Which Was Obtained From Him Only After His Request to Consult With His Personal Counsel, Who Was Present at the Police Station Demanding to Consult With Petitioner, Was Arbitrarily Denied by the Interrogating Police.

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squadroom of a police station" (concurring opinion of Mr. Justice Stewart, *Spano* v. *New York*, 360 U.S. 315, 327, 79 S.Ct. 1202, 1209 (1959)).

In the cases of *Crooker* v. *California* and *Cicenia* v. *LaGay*, this Court held that the refusal of the police to allow those accused their rights to counsel while they were being interrogated by the police did not, *eo ipso*, render their subsequent confessions inadmissible against them at trial as violative of the Fourteenth Amendment to the Constitution. Certiorari has been granted in this case for the purpose of a reconsideration of the correctness of those holdings.

In the case at bar, the petitioner arrived at the Homicide section Detective Bureau of the Chicago Police Headquarters, 1121 South State Street, about 9:30 P.M. on January 30, 1960.[43] He had been brought here under arrest (R. 29).

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[43] Petitioner's testimony on this point places him at the police station earlier in the evening, beginning at about 8:00 P.M. However, in this he appears to be mistaken as all the police agree it was later and Officer Montejano testified it wasn't until later. The arresting officer Gerald T. Sullivan testified he arrived at the Detective Bureau with petitioner around 9:30 or 9:45 (R. 100).

Petitioner testified that, when he got in the office at 11th and State, he asked for the right to speak to his counsel (R. 17, 86). This right was never granted him. Attorney Wolfson testified that he had arrived at the police headquarters detective bureau between 9:30 and 10:00 in the evening. Sergeant Pidgeon was the desk sergeant. Attorney Wolfson asked Sergeant Pidgeon for permission to see his client, the petitioner, giving petitioner's name. Sergeant Pidgeon called the bureau "lockup" and informed the attorney that the petitioner had been taken to the homicide bureau from the lockup. The sergeant then called the bureau and told them that petitioner's attorney was waiting to see him. Sergeant Pidgeon then told Mr. Wolfson that he could not see petitioner.

Mr. Wolfson then went upstairs to the homicide bureau. He identified himself to several homicide detectives and again asked permission to see his client. They, too, told him he could not see petitioner. He was then told to see Chief Flynn.[44] Chief Flynn said that he "couldn't see him because they hadn't completed questioning". Despite further repeated requests "with every police officer I could find" they were never allowed to consult and Mr. Wolfson left the station at about 1:00 A.M. never having talked to his client (R. 79-81).[45]

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[44] Mr. Wolfson thought his conference with Chief Flynn was at approximately 11:00 P.M. However, Chief Flynn testified that this occurred "about 10:00 o'clock, 10:10 or 10:15" (R. 56).

[45] It should be noted, inasmuch as the Illinois Supreme Court felt it was significant (R. 127), that at one point during the evening the attorney and the petitioner did, but only in the literal sense, "see" one another. While Mr. Wolfson was demanding of an officer the right to consult with petitioner, petitioner chanced to observe him through an open door. Mr. Wolfson stated that the door was closed after one or two seconds (R. 80). Petitioner stated that, at that point, he heard Mr. Wolfson trying to yell something to him but he didn't understand what he yelled

Chief Flynn confirms this request. His testimony is that about 9:30 he was advised of the presence of an attorney who was there representing petitioner. He asked that the attorney be sent to his office. He talked to the attorney there between 10:00 and 10:15. At this time Flynn had never talked with petitioner. The attorney told him that his client was in custody. The attorney asked to see petitioner (R. 57). Lieutenant Flynn's testimony is aptly summarized by the following excerpt from his redirect examination:

> "The Witness: He came to the third floor at approximately 10:00 o'clock, ten minutes to 10:00, and introduced himself as being namely Wolfson, and he said he had been retained as counsel by Danny Escobedo who was now in custody.
>
> By Mr. Wesolowski:
>
> Q. And what did you say to him?
>
> A. I asked him why he was in custody and when he was arrested.
>
> Q. What did he say to you?
>
> A. He told me that he did not know how long he had been in custody or where he was.
>
> Q. Then what did you say to him, if anything?
>
> A. I told him that I would make an effort to determine if the man was in custody and if he was in the building.
>
> Q. Was there any other conversation at that time?
>
> A. There was.

(R. 21). Petitioner did testify, however, that the attorney motioned to him with his head which petitioner understood to mean that he should not talk to the police (R. 132). However, this testimony in no manner can be construed to mean that petitioner understood that he had a *right* not to talk to the police. It only means that petitioner understood his attorney to advise him, as a practical matter, not to talk to them.

Q. And just tell us what you said to him and what he said to you.

A. I determined that the man was in the building and he was being—he was under questioning relative to a homicide and I explained to him that the man had only been in the building a very short while and as soon as the officers had completed their questioning that he would be allowed to see him.

Q. And what, if anything, did he say to you then?

A. He started quoting some statute relative to his rights and demands as far as seeing his client.

Q. And then what did you say to him?

A. I went—that was the end of it.

Q. That was the end of the conversation?

A. Yes.

Q. Then where did you go and where did he go, if you know?

A. He walked out of the office. At this time I went over to the Homicide" (R. 61, 62).

The testimony of Officer Gerald Sullivan confirms the refusal of Chief Flynn to allow the attorney to consult with petitioner until the police were finished with him, with no time limit being set (R. 30, 31).

The statement of petitioner was not obtained until after all of the foregoing had transpired (R. 31).

The Illinois Supreme Court, in rejecting the contention "that the confession is admissible because it was obtained after [petitioner] had requested the assistance of counsel, which request was denied" (R. 128), held "that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to a reasonable opportunity to interrogate outside the presence of counsel" (R.

134). It is respectfully submitted, that, in light of the constitutional, as well as statutory, rights of an accused to counsel and to be free from the spectre of self incrimination, the police have no such "right".[46] To allow the police any such "right" in a situation where the accused or his counsel request consultation wholly vitiates any rights an accused has under the Constitution.

The most persuasive brief that could be proposed by petitioner has already been written. In the opinion filed in *Crooker* v. *California* on behalf of the four dissenting justices, Mr. Justice Douglas[47] has forcefully and succinctly set forth the grounds and rationale under which the denial of the right of consultation deprives an accused of due process

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[46] A Connecticut appellate court, in *State* v. *Krozel*, 24 Conn. Sup. 266, 190 A.2d 61 (1963), has recently reversed a conviction and ordered the defendant discharged from a drunk driving charge where the police had refused to let him telephone his attorney after he had been charged. The defendant had been arrested by a state trooper, who had observed his erratic driving, and taken to the state police barracks where a routine sobriety test, which the defendant failed, was conducted. He was then "charged" with the offense and placed "in the lockup". Only then, for the first time, did the defendant ask permission to phone his attorney, which request was denied. He was released on bond at 8:00 A.M. the following day, about 8 hours later. There was no confession involved and the totality of the State's evidence consisted of matters that transpired prior to the defendant's request for counsel. Basing its reasoning upon the dissent of Mr. Justice Douglas in the *Crooker* case plus the separate opinion of Mr. Justice Stewart, in the *Spano* case, the Connecticut Appellate Court concluded that the defendant had a constitutional due process right to the assistance of counsel, and that his conviction was fatally defective because his request to telephone his counsel had been denied. This rule would preclude *prosecution* where the right to counsel has been denied, not merely require the exclusion of subsequent confessions.

[47] See also Mr. Justice Douglas' concurring opinion in *Culombe* v. *Connecticut*, 367 U.S. 568 at 637 et seq., 81 S.Ct. 1860 at 1897 et seq. (1961).

which renders any subsequently elicited statement inadmissible.[48] Little can, or should, be added thereto.[49]

Reference, however, might also be made to the concurring opinion of Mr. Justice Stewart in *Spano* v. *New York*, to wit:

> "While I concur in the opinion of the Court, it is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment" (360 U.S. at 326, 79 S.Ct. at 1209).

In *Spano*, the accused had already been indicted for the crime for which he was being interrogated. Yet that fact has no real significance insofar as the inherent vice of the procedure and the effect on the accused is concerned.

Recognizing that the existence of an indictment makes no effective difference, the Court of Appeals of the State of New York has just announced, for the State of New

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[48] It is of interest to note that the trial court evidently applied this standard in the case of the co-accused, Bobby Chan. Both were represented by Attorney Warren Wolfson (R. 5). Both executed statements only after each had requested to speak to Wolfson and he had requested to see them. Chan's statement was suppressed prior to trial and the State chose thereafter not to proceed against him. The only reason that the Court gave for distinguishing the situation of the two, aside from the judge's personal evaluation of the two personalities, was that petitioner was aware that Wolfson was there but Chan wasn't (R. 41). Accordingly Chan's statement was suppressed because his counsel had been refused the right to consult with him. (See also R. 106.)

[49] Professor Broeder has analyzed various decisions of this Court that have been rendered since the *Crooker* and *Cicenia* cases (Broeder, op. cit., 42 Neb. L. Rev. 483 at 598-606 (1963)). He has been "virtually compel [led to] the conclusion that the dissenting opinions in *Crooker* and *Cicenia* represent the view of a majority of the Court's present membership and that, at the least, due process now requires the exclusion of any confession obtained in the absence of counsel when a defendant has requested that one be present during the questioning" (id. at 606).

York, the rule here proposed by petitioner. In *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963), Donovan and a co-defendant had been apprehended by police a day after a murder and robbery had occurred. Both were questioned at a police station and, after a period of interrogation by police and prosecutor, admitted their guilt orally and in writing. The written confession was taken from Donovan after the police had refused to allow an attorney, retained for him by his family while he was in custody, to see or speak to him. New York's highest tribunal held:

> "that, quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions to the privilege against self incrimination and the right to counsel * * *, not to mention our own guarantee of due process * * *, require the exclusion of a confession taken from defendant, during a period of detention, after his attorney had requested and been denied access to him." [30]

The language of the New York Court aptly states and resolves the issue:

> "It needs no extensive discussion to establish the high place which the privilege against self incrimination enjoys in our free society. The right of an accused to counsel as a procedural safeguard in our system of government enjoys equal eminence. [Citations] In the case before us, these rights and privileges converge, for one of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self incrimination and prevent the deprivation of that and other rights which may ensue from such detention. It would be highly incongruous if our

[30] 193 N.E. 2d at 629.

system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer seeking to speak with him, was kept from him by the police.

"We have held—and the United States Supreme Court has recognized (see *Crooker* v. *California*, 357 U.S. 433, 439-440, 78 S.Ct. 1287, 2 L.Ed. 2d 1448, supra,)—that the right to counsel extends to pre-trial proceedings as well as to the trial itself. [Citations] The need for a lawyer is surely as great then as at any other time; as Mr. Justice Black pointedly observed in the course of a dissent, 'The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination.' (In re *Groban*, 352 U.S. 330, 344, 77 S.Ct. 510, 519, 1 L.Ed. 2d 376.)

"It has, however, been urged that to permit a suspect, in cases such as the present, to confer with an attorney before talking to the police would preclude effective police interrogation and would in many instances impair their ability to solve difficult cases (See, e.g., *Crooker* v. *California*, 357 U.S. 433, 441, 78 S.Ct. 1287, 2 L.Ed. 2d 1488, supra; *Cicenia* v. *Lagay*, 357 U.S. 504, 509, 78 S.Ct. 1297, 2 L.Ed. 2d 1523, supra; *People* v. *Escobedo*, 28 Ill. 2d 41, 47-50, 190 N.E. 2d 825, 828-829). Weighty though such considerations be, they do not permit us to ignore rights due that accused under our law. We gave thought to somewhat similar arguments in recent cases and rejected them as insufficient reason for disregarding individual rights when we stamped as impermissible police interrogation of an accused, in the absence of counsel, following his arraignment or indictment and held inadmissible the resulting confessions even though they were concededly uncoerced and voluntary. [Citations]

"We find these arguments equally unsubstantial in this case. Just as in those cases we condemned post-arraignment and post-indictment questioning 'without the protection afforded by the presence of counsel' (*People* v. *Waterman*, 9 N.Y. 2d at p. 565, 216 N.Y.S. 2d, at p. 75; 175 N.E. 2d, at p. 448), so here we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together. And, it necessarily follows, if such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also, to quote from our opinion in *Waterman*, 9 N.Y. 2d at p. 565, 216 N.Y.S. 2d at p. 75, 175 N.E. 2d, at p. 448, 'contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'" [51]

It should be observed that Donovan had not asked for the attorney nor had he retained him. The attorney had been retained for Donovan by his family without his knowledge and Donovan was not aware that his attorney had been at the station. The case at bar is much more extreme than *Donovan*. Here the attorney had been personally retained by petitioner. Here, in addition to the attorney asking to see petitioner, petitioner asked to see his attorney. Here petitioner learned that his attorney was at the station asking to see him, but he quickly was made aware that this was being denied. Thus the effect of the lack of consultation is much more coercive on petitioner than it was on Donovan. If it is a denial of due process, which renders a subsequent confession inadmissible, to refuse to allow an unknown [to the suspect] and unrequested [by the suspect] attorney to consult with an unaware [of his presence] prisoner, it

[51] 193 N.E. 2d at 629-630.

is a greater denial to refuse to allow a retained and requested attorney to consult with a prisoner who knows that the attorney, albeit unsuccessfully, is trying to gain access to him.

It is respectfully submitted that the rule required by the due process clause of the Constitution of the State of New York, in conjunction with the guarantees to counsel and freedom from self incrimination, is likewise required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Therefore, this Court is urged to announce that, upon reconsideration, the holdings of *Crooker* and *Cicenia* have been overruled and the standard proposed by the dissenting justices therein, the same standard adopted by the Court of Appeals of New York, has been adopted.

Conclusion

For the reasons stated in this brief, the judgment below should be reversed, since the sole evidence of petitioner's guilt is contained in the inadmissible statement obtained in derogation of petitioner's right to due process of law.

Respectfully submitted,

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